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No. 03-781

In the Supreme Court of the United States

JIMMY DOUG SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a third party with unrestricted "common authority" over a house may search that house while acting as an agent for the government.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 337 F.3d 529. The opinion of the district court denying petitioner's motion to suppress (Pet. App. 21a-38a) is reported at 181 F. Supp. 2d 649. The report and recommendation of the magistrate judge recommending that the motion to suppress be granted (Pet. App. 39a-47a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2003. A petition for rehearing was denied on August 27, 2003. The petition for a writ of certiorari was filed on November 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Mississippi, petitioner was convicted of filing a false tax return for his bingo operation, Vietnow, Inc., in violation of 26 U.S.C. 7206(2). Gov't C.A. Br. 12; Judgment. The district court sentenced petitioner to nine months of imprisonment to be followed by one year of supervised release and imposed a $20,000 fine. Gov't C.A. Br. 12. The court of appeals affirmed petitioner's conviction. Pet. App. 1a-20a.

1. On April 29, 1997, petitioner's then-wife, Cheryl Shelton, discovered that petitioner was having an affair and abruptly moved out of the home she had shared with him during six years of marriage. Gov't C.A. Br. 3; Pet. App. 2a, 16a. When she left, Cheryl took some of her clothes and personal possessions, but left behind other belongings, including clothes, jewelry, photographs, and furniture. Pet. App. 2a. Although Cheryl was not a co-owner of the house, she retained her house key and personal access code for the security system. *Id.* at 22a. In addition, she visited the house on several occasions with petitioner's knowledge and consent and, at times, at his request. *Id.* at 23a-25a. She and petitioner were not legally separated, and neither party filed for divorce. *Id.* at 2a.

Shortly after Cheryl moved out, her sister, Debbie Wheeler, informed her that the IRS was investigating petitioner and his bingo operation. Debbie Wheeler explained that she was cooperating with the investigation, and she encouraged Cheryl to meet with the government. Pet. App. 2a.

On May 5, Cheryl met with the government and offered to cooperate. Pet. App. 2a; Gov't C.A. Br. 4.

Cheryl informed the government that petitioner had formed Vietnow to skim money from the bingo operation and that she had been involved in the criminal activity. Gov't C.A. Br. 4. She also informed the government that petitioner had not reported income from the operation on their tax returns. *Id.* at 4-5.

In addition, Cheryl told the government about various items kept in the house that might assist the investigation, including illegal bingo cards and records documenting the skimming. Pet. App. 3a. The government told Cheryl that it would be interested in the skimming records and other items relevant to the investigation. *Ibid.*

Over the next several months, Cheryl visited the house on a number of occasions, sometimes on her own initiative and sometimes at the direction of the government, to obtain evidence. Pet. App. 3a. She also used the visits to pick up personal belongings and her mail, which she continued to receive at the house and which petitioner collected and kept inside for her. *Ibid.*; Gov't C.A. Br. 3, 6-10. On at least three occasions, Cheryl also came to the house to participate in petitioner's skimming operations, and, once, petitioner asked her if she would stay in the house while he was out of town. Pet. App. 24a-25a; Gov't C.A. Br. 8, 10. At no point did petitioner attempt to limit Cheryl's access to the house, and the evidence she obtained was located in areas to which she had free access. Pet. App. 25a, 42a.

In exchange for her cooperation, the government assured Cheryl that she would not be prosecuted. Pet. App. 3a. The government also paid some of her living expenses during the investigation and helped to relocate her when the investigation concluded. Pet. App. 40a; Gov't C.A. Br. 9-10.

2. In September 2000, a federal grand jury in the Northern District of Mississippi returned a fifty count indictment charging petitioner and three others with, *inter alia*, mail fraud, illegal gambling, money laundering, and tax fraud connected with the bingo operation. Pet. App. 22a; Gov't C.A. Br. 2. Petitioner filed a motion to suppress the evidence seized during nine visits by Cheryl to the house. A magistrate judge recommended that the district court grant the motion to suppress. Pet. App. 39a-47a. "[T]he magistrate judge acknowledged that [petitioner] had made no attempt to limit Cheryl's access to the home, and noted that the items that Cheryl had taken from the home after she moved out were located in areas to which she had free access." *Id.* at 4a. "Emphasizing that Cheryl maintained no ownership interest in the home, however, the magistrate judge concluded that Cheryl's permission from [petitioner] to enter the home, although not limited spacially, was limited functionally to picking up her mail and personal belongings." *Ibid.* Based on Cheryl's having exceeded that limitation, the magistrate judge recommended that the motion to suppress be granted. *Ibid.*

The district court denied the motion to suppress. Pet. App. 21a-38a. Based on the magistrate judge's factual finding that petitioner had neither attempted to limit his wife's access to the home nor attempted in any way to exclude her access to the evidence, the court concluded that Cheryl "had actual common authority to permit a search by agents of the government and to deal directly with the contents of the house." *Id.* at 5a.

After his motion to suppress was denied, petitioner entered into a conditional plea agreement. Pursuant to that agreement, petitioner pleaded guilty to a count of filing a false tax return and consented to forfeiture of

the Vietnow bingo building and $303,719.73. Pet. App. 5a. Petitioner reserved his right to appeal the denial of his motion to suppress. *Ibid.* The court accepted the plea and sentenced petitioner to nine months of imprisonment to be followed by one year of supervised release and imposed a $20,000 fine. *Ibid.*

3. Based on a "close review of the record and * * * analysis of relevant authority," the court of appeals affirmed petitioner's conviction. Pet. App. 1a. The court began by noting that valid consent to a search is a well-established exception to the general rule that the government must have a warrant supported by probable cause before it may search a house. *Id.* at 6a. The court recognized that the constitutionality of the search in this case turns on whether Cheryl Shelton could validly consent to a search of petitioner's house because, "although she did not literally usher government agents into the house so that they could conduct their own search, Cheryl effectively allowed them to search the premises by acting as their agent in collecting and delivering items of evidence for them." *Id.* at 8a. The court noted that, if Cheryl had still been living in the house with her husband at the time of the searches, she would unquestionably have had "common authority" to authorize the searches. *Id.* at 7a. The court therefore focused on whether she relinquished that common authority when she "moved out of the marital residence one week before she agreed to assist the government in its investigation." *Ibid.*

After reviewing a number of cases involving similar but ultimately distinct facts, the court stated that determining whether someone in Cheryl's position has authority to authorize or to conduct a search requires "an intensely fact-specific inquiry and that slight variations in the facts may cause the results to vary."

Pet. App. 12a. Examining "the privacy interests that animate the rule of third party consent," the court concluded that Cheryl's authority to authorize the searches turned on "whether [petitioner] sufficiently relinquished his expectation of privacy to [her], *i.e.*, allowed mutual or common use of the premises to the extent of joint access and control for most purposes, so that it is reasonably anticipated that [she] might expose the same privacy interest to others, even including law enforcement officers." *Id.* at 14a-15a.

In conducting that inquiry, the court rejected petitioner's argument that his wife's access had been "strictly limited to retrieving her belongings and picking up her mail." Pet. App. 15a-16a. Rather, the court concluded, Cheryl enjoyed essentially the same access to the house that she had before she left:

> [Petitioner] never asked her to vacate the house in the first place; she left on her own volition because of his purported marital infidelities. He never filed for separation or divorce; he never changed the locks or revoked Cheryl's personal security code; he was aware that Cheryl returned to the house from time to time, and he sorted her mail for her; he apparently invited her to stay at the house on one occasion when he planned to be out of town; he never changed the locations of incriminating evidence of the bingo operation from places where they were kept while she was living at the house; and perhaps most importantly [petitioner] never ceased his efforts to involve her in the alleged skimming operation even five months after she moved out.

Id. at 16a-17a. Based on those facts, the court concluded that petitioner "held no subjective expectation of privacy toward [his wife] at any time, either before

or after her move." *Id.* at 17a. To the extent that petitioner expected that his wife would keep information and materials about the bingo operation private, that expectation was not reasonable: "It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities." *Ibid.* (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984)). The court of appeals therefore held that petitioner's wife had common authority to authorize or conduct a search of the premises. *Id.* at 19a.

ARGUMENT

Petitioner contends that a third party, who in her personal capacity has unrestricted common authority over a house, may not consent to or conduct a search of the premises once she becomes a government agent. See Pet. i, 10-11, 15, 16, 23-25. That claim is not properly before this Court and, in any event, does not warrant this Court's review.

1. On appeal, petitioner's sole contention was that his wife lacked the common authority necessary to authorize or to conduct a search because her access to and authority over the house were "limited to retrieving her belongings and picking up her mail." Pet. App. 15a-16a. See Pet. C.A. Br. 12-50; Pet. C.A. Reply Br. 1-15. Based on an "intensively fact-specific inquiry" (Pet. App. 12a), the court of appeals rejected that claim and concluded that petitioner's wife retained unrestricted, common authority over the house during the period immediately after she moved out. See *id.* at 16a-17a, 19a-20a. The court of appeals' decision is amply supported by the record and, particularly given its fact-bound nature, does not warrant review by this Court.

In this Court, petitioner does not seriously contest that aspect of the court of appeals' decision. Instead, petitioner contends that an individual loses her authority to consent to a government search once she becomes an agent of the government. See Pet. i, 10-11, 15, 16, 23-25. Petitioner did not make that claim in either his opening or reply brief in the court of appeals, and that court did not address it. The claim is therefore not properly preserved for this Court's review. See *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, petitioner's contention is without support in either precedent or policy. Petitioner cites no case holding that an individual with an *unqualified* right of access to and common authority over property loses her right to consent to a government search of that property if she becomes a government agent. As the court of appeals noted, this Court has made clear that individuals who expose their illegal conduct to another person assume the risk that the other person will provide that information to law enforcement. See Pet. App. 17a (quoting *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984), and *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966)). That same principle holds true even if the other person is a government agent but the defendant mistakenly believes that the person is acting in a private capacity. See *Lewis* v. *United States*, 385 U.S. 206 (1966). A contrary rule would severely hamper law enforcement. See, *e.g.*, *United States* v. *Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) ("In essence, Bramble argues that when inviting strangers into his home to engage in illegal activity, he may condition his consent to entry on the strangers' not

being law enforcement officers. As the Supreme Court pointed out in *Lewis*, adoption of such a rule would mean the end of undercover work.").

Thus, although only a few cases have addressed the question directly, those cases have consistently upheld the right of an agent who has common authority over property to consent to or conduct a search of that property. For example, in *United States* v. *Jenkins*, 46 F.3d 447, 459-460 (5th Cir. 1995), the court specifically rejected the argument that a private citizen has no more authority than an FBI agent upon becoming a government agent: "becoming an 'agent' for purposes of Fourth Amendment analysis does not terminate one's right to engage in conduct which was authorized prior to entering into the agency relationship." Similarly, the Third Circuit in *United States* v. *West*, 453 F.2d 1351, 1357 (1972), held:

> The mere fact that an agency relationship might have arisen between Trott and the police could not encroach upon the right of Trott to enter and search his own car any more than it could suspend Trott's right to enter and search his own house. If the rule were to the contrary, a criminal could safely hide his contraband in the home or car of any policeman, then move to suppress the evidence when the evidence was subsequently discovered.

See *United States* v. *Williams*, 106 F.3d 1173, 1177 (4th Cir.) (government informant had right to open, or to consent to the opening of, envelopes addressed to him), cert. denied, 522 U.S. 847 (1997); 1 Wayne R. LaFave, *Search and Seizure* § 1.8(b), at 222-223 (3d ed. 1996) ("While it is often said that under these circumstances the private person becomes the 'agent' of the government official, it should not be presumed from this that

the agent inevitably has no more authority than his principal. To take the most obvious case, it is lawful for the agent to conduct a warrantless search of areas under his proper control even though the requesting officer could not do so on his own."). The court of appeals correctly applied that principle here.

2. Petitioner contends (Pet. 10-21) that the court of appeals' decision conflicts with this Court's precedents in three ways. He is incorrect about each.

First, petitioner contends (Pet. 10-15) that the decision below conflicts with this Court's cases holding that governmental searches and seizures are subject to the Fourth Amendment. More specifically, petitioner argues that the court of appeals failed to consider that Cheryl Shelton was acting as a government agent and therefore "began with the flawed premise that the Fourth Amendment does not apply." Pet. 10. Contrary to that contention, the court of appeals expressly and repeatedly noted that Cheryl was acting as a government agent and that the search was therefore subject to the Fourth Amendment. See, *e.g.*, Pet. App. 1a ("[W]e hold that Shelton's Fourth Amendment rights were not violated by admission of evidence obtained for the government by Cheryl as a paid informant."); *id.* at 8a ("Although she did not literally usher government agents into the house so that they could conduct their own search, Cheryl effectively allowed them to search the premises by acting as their agent in collecting and delivering items of evidence for them during the period and at their express direction and control."). If, as petitioner contends, the court of appeals had concluded that the Fourth Amendment did not apply to the search, the court would have had no reason to conduct an extensive and thorough analysis of

Cheryl's authority to consent and petitioner's expectation of privacy. See Pet. App. 1a, 6a-20a.

Second, petitioner mistakenly contends (Pet. 15-16) that the decision below conflicts with this Court's cases requiring that consent to search be voluntary. Petitioner argues that the court of appeals erred by "never consider[ing] the question of whether Cheryl Wheeler's 'consent' to the searches and seizures was *voluntary*." *Id.* at 15. The court of appeals did not address that issue because petitioner "concede[d] that Cheryl Shelton's consent to cooperate with the government was voluntary." Pet. App. 25a n.1. In any event, there is no support for petitioner's contention that consent is necessarily involuntary in "all 'agency relationships' in which the person giving consent is also seeking immunity from prosecution." Pet. 16. Accepting that logic would call into question the legitimacy of well-established practices, including plea agreements and testimony under immunity agreements. Nor is there any basis to conclude that Cheryl Shelton was coerced to cooperate in this case. Indeed, she initiated contact with the government in order to volunteer her assistance. See Pet. App. 2a.

Third, petitioner incorrectly contends (Pet. 16-21) that the decision below is inconsistent with an implied distinction in this Court's third-party consent decisions between someone who has an unrestricted, independent right to use property and someone who, as a guest or visitor, has a derivative and limited right to use the property. Contrary to petitioner's contention, the court of appeals did not hold that a guest or visitor who has limited access to property may consent to a search of that property. Rather, the court of appeals held that petitioner's wife retained "common authority" over and "essentially unrestricted access to the house, on par

with the access that she had enjoyed while residing there as [petitioner's] spouse." Pet. App. 19a. The court rejected petitioner's contention that his wife's access "was limited to retrieving her belongings and picking up her mail." *Id.* at 15a-16a. The court's conclusion that petitioner's wife's common authority over the house authorized her to conduct a search is fully consistent with this Court's precedent. See *United States* v. *Matlock*, 415 U.S. 164, 171 (1974).

3. Petitioner's contention (Pet. 21-23) that the decision below conflicts with decisions of other courts of appeals also lacks merit. Petitioner cites no court of appeals decision supporting his contention that there is a conflict. Moreover, petitioner specifically stated in his brief in the court of appeals that "[t]his is a unique case," and there is no case law directly on point. Pet. C.A. Br. 44-45; see Pet. App. 9a (stating that "we are aware of no case in which a court has confronted essentially identical factual circumstances"). To the extent that other court of appeals cases are relevant, they support the decision of the court of appeals here. See pp. 8-9, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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